Supreme Court, U.S.
FILED

03 333 JUL 14 2003

No.

In The
Supreme Court of the United States

LI YU,
Administrator of Deceased Wei Wu's Estate.
Petitioner,

v.

STATE OF TEXAS DEPARTMENT OF TRANSPORTATION;
CAROLINE A. HERRERA,
In Her Individual and Official Capacity;
KATHERINE HOLTZ,
In Her Individual and Official Capacity.

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Li Yu, Petitioner
1514 SW. Wayne Avenue
Topeka, Kansas 66604
(785) 233-0237

QUESTIONS PRESENTED

1. Whether Texas Department of Transportation, a State Government Agency, can be sued under the term "Covered Entity" in the Americans with Disabilities Act for its discriminatory employment practice that caused the wrongful death of Dr. Wei Wu?

2. Whether Title 42 U.S.C. §§2000e-5, the "Enforcement Provision", is to provide an option to plaintiffs for administrative remedy or to set a prerequisite to prevent plaintiffs from filing discrimination case with Court?

3. Whether the District Court, disregarding human life, failed to uphold Equal Justice under Law and abused its discretion to violate the Seventh Amendment for jury trial by dismissing this entire case?

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OPINION BELOW

The Fifth Circuit Court of Appeals did not select its opinion for publication. Its pertinent rulings from the bench are reprinted in the Appendix on pages a-b.

This case was preserved for jury trial but the District Court dismissed the entire case without jury trial.

The lower courts construed that the U. S. Supreme Court's ruling of *Board of Trustees of the University of Alabama v. Garrett* had excluded the States from the "Covered Entity" in Americans with Disabilities Act (ADA).

JURISDICTION

The Fifth Circuit filed its decision on April 18, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court decision on a writ of certiorari.

Pursuant to Rule 13 of the U. S. Supreme Court, this petition is timely filed within 90 days after entry of the judgment of the Court of Appeals for the Fifth Circuit.

STATUTORY PROVISIONS INVOLVED

The questions presented implicate the following provisions of the United States Constitution:

Constitutional Amendment VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Constitutional Amendment XIV

No State shall make or enforce any law which shall abridge the privilege or immunity of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. §§12112 - Discrimination

(a). General rule

No **covered entity** shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to ... **privileges of employment**.

Title 42 U.S.C. §§2000e-5 - Enforcement

(a). Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 and 2000e-3 of this title.

Title 28 U.S.C. §§1331

The District Court shall have **original jurisdiction** of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF FACTS

The real petitioner-plaintiff, Dr. Wei Wu ("Dr. Wu"), deceased, was an engineer supervisor with the Texas Department of Transportation (TxDOT). After brain surgery, Dr. Wu's medical doctors released his confidential medical information to others including TxDOT without consent.

After which, TxDOT, regarded Dr. Wu as a disabled individual, denied his privileges to work and segregated him from his office. On November 18, 1999, Dr. Wu first returned to work after a few days of rest after release from the hospital. The defendants did not welcome him back to work. Instead, they asked Dr. Wu to continue sick leave for medical treatment. When Dr. Wu expressed that he felt fine and did not want further medical treatment at that time, the defendants became upset and required that he get a release from his doctor. Even though the defendants knew that Dr. Wu desired to work and could not drive alone to his doctor's office in Austin's busy traffic[1] due to the surgery, they did not accommodate him to acquire such release, such as give him a ride to his doctor's office and so on. On the contrary, they expelled Dr. Wu from his office before noon of November 18, 1999. On the early morning of November 19, 1999, Dr. Wu went to his office to work again. When the individual defendants arrived to the office later seeing Dr. Wu, they became very upset again and ordered Dr. Wu to leave the premises of TxDOT immediately and not to come back again until he received the release from his doctor. This time two TxDOT employees escorted Dr. Wu to leave the TxDOT premises for his apartment. Regarding his partial work on these two days, the TxDOT defendants refused to allow Dr. Wu to charge work hours on the time sheet. The next day, November 20, 1999, Dr. Wu was reported to commit suicide.

After Dr. Wu's death, the plaintiff, Li Yu ("Yu") was appointed to be the administrator of Dr. Wu's estate. Yu attempted to file a discrimination charge on behalf of Dr. Wu with the Texas Commission on Human Rights (TCHR). However, TCHR refused simply because Dr. Wu had passed away[2]. Yu also contacted the EEOC, no response was

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[1] Dr Wu lived alone in Austin. His apartment was closed to his office.

[2] This is also one of causes in petitiorer's another case against the State of Texas on the constitutionality of Texas statutes and equal protection.

received at that time. In December of 2000, Yu filed a lawsuit with the Texas State Court on behalf of Dr. Wu against TxDOT. The State Court dismissed the suit simply because Yu was not a lawyer.

In October of 2001, Yu filed this lawsuit with the U. S. District Court for the Western District of Texas under ADA, Title VII, etc. The district court, ignoring the facts, provided immunity to TxDOT and individual defendants in their official capacity ("TxDOT defendants") January 7, 2002. According to the district court, the TxDOT defendants were immune from the ADA suit due to the Supreme Court's ruling on the *Garrett* case, and immune from Title VII due to Yu's failure to file a discrimination charge with TCHR/EEOC. See *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). Thus this case went to appeal. While the case was pending for appeal, the district court called the case for trial July 18, 2002. Upon agreement, the defendants filed a party-agreed "Motion to Postpone" July 24, 2002 due to the appeal. The district court denied the "Motion to Postpone" July 29, 2002 and demanded parties go to Court for trial August 2, 2002. Yu was living 800 miles away from the district court and received the July 29 order after August 2, 2002, so it was impossible for Yu to appear at the trial. In addition, prior to August 2, 2002, the district court never had any discovery, status[3], or pretrial conference to inquire the progress of discovery. The case could not even be discovered due to the dismissal of the TxDOT defendants. Because Yu did not show up in Court August 2, 2002, the district court used it as an excuse to dismiss the entire case for want of prosecution. The appellate court affirmed the district court's judgment on April 18, 2003. It is from this ruling that the petitioner- plaintiff seeks relief.

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[3] The district court once scheduled a status conference but cancelled it at the last minute without informing Yu in a timely manner, which caused Yu of wasting money and time for travel.

REASONS FOR GRANTING THE WRIT

1. A STATE GOVERNMENT AGENCY LIKE TxDOT DOES NOT HAVE IMMUNITY UNDER ADA SUIT.

A. The Term "Covered Entity" in ADA, Title 42 U.S.C. §12112, Covers the State Government Agency.

Title 42 U.S.C. §§12112(a) prohibits the "Covered Entity" from discriminating against a qualified individual with a disability because of the disability of such individual in regard to ... other terms, conditions, and privileges of employment. The "Covered Entity" is further defined to include the State and the State Government Agency according to §§ 12111(2), (5), (7), and §§2000e. Also see *Board of Trustees of the University of Alabama v. Garrett* 531 U.S. 356 (2001). This inclusion clearly abridges the immunity of TxDOT under ADA lawsuit.

B. The U. S. Supreme Court's Ruling of the *Garrett* Case Did Not intend to Exclude States from the "Covered Entity" in the ADA.

Since the original ADA law clearly prohibits States from discrimination against a qualified disabled individual due to disability, it was inappropriate for the lower courts to misconstrue the *Garrett* case as to exclude States from the "Covered Entity" of the original ADA. In other words, unless the Legislative Branch modifies the current ADA law to specifically exclude States from "Covered Entity", the Judicial Branch should not construe or execute ADA law in contradiction with the original ADA law. To this end, the U. S. Supreme Court's ruling of the *Garrett* case did not intend to exclude States from "Covered Entity" of the original ADA law. Certainly, a frivolous case should be dismissed, which, however, should not unreasonably bar the whole group of disabled individuals from filing the good cause actions under ADA law against the State's discrimination. Otherwise, the law in fact dies due to the misinterpretation of the original law even though the law book still exists.

C. This Case Is Different from *Garrett's* Case.

In reality, there are no two identical cases. Each case has its own specific circumstance. Under some circumstances, the demotion of a disabled individual was a type of accommodation and within the meaning of ADA law. In *Garrett's* case, *Garrett* was at least not denied work or isolated or enforced to take sick leave due to her disability. If she could survive the cancer, *Garrett* would have more opportunities to advance in the future. If she couldn't, the demotion to relieve her duty was a good choice to accommodate her for her disability. As *Garrett* applied for a lower position, it was questionable whether she was qualified to seek monetary damages under ADA law.

This wrongful death case is completely different from the *Garrett* case. First, the TxDOT defendants conspiratorially threw out Dr. Wu from his office, and exposed him to public humiliation due to his disability on two consecutive days, which took away Dr. Wu's dignity and promoted him to end his life on the third day. Second, whether or not Dr. Wu had cancer was questionable even though the TxDOT defendants believed so and undoubtedly regarded him as a disabled individual[4]. The irreversible damages gave a rise to the issue of monetary damages in this case. Like other state employees, Dr Wu had a right and privilege of employment to walk into his TxDOT office to work on projects, talk with co-workers, check E-mail, make phone calls, determine an appropriate time for vacation and sick leave and return to work, etc. He also had a constitutional right and liberty not to attend a medical appointment that he did not personally make and not to take medical treatment that he suspected. Such of his enjoyment of civil rights, privileges, and liberties were deprived. All of these facts are different from *Garrett* case. So the lower Courts should enforce the original ADA law rather than the case law of *Garrett* into this case.

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[4] Autopsy report stated that no cancerous residual was found in Wu's body

D. TxDOT Defendants Utilized an Administrative Standard to Discriminate against Dr. Wu due to His Disability, and Failed to Accommodate Dr. Wu to Meet the Standard, Which Violated ADA and Took Away Dr. Wu's Life.

The ADA law prohibits employers from "utilizing standards, criteria, or methods of administration ... that have the effect of discrimination on the basis of disability." §§12112(b)(3)(A). The Act defines "disability" to include (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." §§12102(2). A disabled individual is otherwise "qualified" if he or she, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. §§12111(8)... To this end, the Act requires employers to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business. §12112(b)(5)(A). *Board of Trustees of the University of Alabama v. Garrett*. This accommodation includes making existing facilities used by employees readily accessible to and usable by individuals with disabilities §12111(9).

Though TxDOT defendants knew from Dr. Wu's doctor that it was inappropriate for Dr. Wu to drive alone after surgery, nobody informed the TxDOT that Dr. Wu was unable to perform his assigned duties. Accordingly, if the TxDOT really needed a release from his physician stating that he was able to return to work, the TxDOT defendants could accommodate Dr. Wu to obtain such release rather than to segregate him from co-workers and enforce him to drive alone. The TxDOT had its own vehicles that were within the meaning of "existing facilities". The accommodation of a

disabled individual for his work-related driving did not impose an undue hardship on the operation of the TxDOT, but letting Dr. Wu drive alone to his doctor's office might be unsafe. Since the TxDOT raised the issue for a "release from his doctor", the TxDOT had an obligation to accommodate but failed to accommodate Dr. Wu to his doctor's office to obtain such work-related release on November 18 and 19, 1999. In addition, disallowing Dr. Wu to charge the work hours for his partial work on November 18 and 19 further demonstrated the TxDOT's intent to discriminate against disabled individuals. Obviously, the enforcement of a release from the doctor without reasonable accommodation was to make an undue hardship on Dr. Wu due to disability. Finally, the TxDOT could have used but failed to use other options to obtain the "Release" without need to expel Dr. Wu from his office. Such as the TxDOT could have made a phone call to his doctor's office, faxed the request, or sent mail in order to obtain the "Release". Certainly, these accommodations to Dr. Wu's disability did not impose an undue hardship on the operation of the TxDOT. It was perfectly clear that the TxDOT utilized a standard of administration, the "Release" from the doctor, as a pretext to discriminate against Dr. Wu, impose an undue hardship on him, and isolate him from his co-workers due to his disability. The Fourteenth Amendment to the U. S. Constitution states that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. The Fourteenth Amendment allows federal power to intrude upon the province of the Eleventh Amendment and, therefore, to abrogate states' Eleventh Amendment immunity from suit. *Seminole Tribe of Florida v. Florida*, U.S.Fla. 1996, 116 S.Ct. 1114, 517 U.S. 44, 134 L.Ed.2d 252. The TxDOT defendants clearly violated Dr Wu's civil rights, privileges, and liberties, took away his dignity, made him feel worthless, aggravated his emotional distress, and eventually deprived him of his life, upon which the TxDOT defendants were not qualified for immunity.

2. THE "ENFORCEMENT PROVISION" OF TITLE VII IS TO ENFORCE PLAINTIFF'S CIVIL RIGHT AND NEVER ABRIDGES THE ORIGINAL JURISDICTION OF THE DISTRICT COURT TO REVIEW A CASE.

A. The Original Federal Anti-Discrimination Law Provides an Option for Plaintiff to Relieve Anguish Caused by Discrimination and Has Never Set a Prerequisite for Exhaustion of Administrative Remedy in Disfavor of Plaintiff.

The defendants alleged that Title 42 U.S.C. §§2000e-5, "Enforcement Provisions", set a prerequisite for exhaustion of administrative remedy prior to filing the case with the federal court. As a matter of fact, the alleged prerequisite does not exist. §§2000e-5 provides a plaintiff an option for administrative remedy to relieve anguish caused by discrimination, which has nothing related to the prerequisite. In other words, the Lawmakers never set such prerequisite in the "Enforcement Provisions", but defending lawyers who work for money in this country add this poisonous additive to weaken the Federal anti-discrimination law.

In order to enforce the plaintiff's civil rights and eradicate the deep-rooted discrimination in this country, Congress amended anti-discrimination laws including equal access to the public accommodation, equal employment opportunity, etc. In the first subchapter, 42 U.S.C. §§2000a-6(a), the Congress clearly expressed that the District Courts have jurisdiction in anti-discrimination action **without regard to whether plaintiff exhausts administrative remedies.** In order to keep consistent with the federal anti-discrimination law §§2000, this clear expression should be logically extended to §§2000e as well. Therefore, the administrative remedy should be logically construed to be an option for plaintiff, but this option should not take precedence over the original jurisdiction of the District Court to review the case if plaintiff decides to go to the Court for redress of grievance.

In 42 U.S.C. §§2000e-5, Congress suggested that the Court appoint counsel for plaintiff, the Attorney General on behalf of plaintiff intervene in such suit involving a government agency, Anti-discrimination Commissions have power to assist plaintiff for administrative remedies, etc. The ADA also has an "Enforcement" section, 42 U.S.C. §§12117, adopting the section §§2000e-5 and other sections in order to enforce ADA laws and the plaintiff's rights. All of these "Enforcement Provisions" are to prevent unlawful employment practices rather than to prevent plaintiffs from taking legal actions in the Federal Court.

The first provision, §§2000e-5(a) manifests such intent. "Power of Commission to prevent unlawful employment practices:

> The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title."

Clearly, that Congress has made, amended, and enforced these anti-discrimination laws is in favor of plaintiffs and to deter discrimination in this country.

B. The Alleged Prerequisite for Exhaustion of Administrative Remedy Has a Conflict with Federal Jurisdiction Law.

Title 28 U.S.C. §§1331 states that the District Court shall have **original jurisdiction** of all civil actions arising under the Constitution, laws, or treaties of the United States. This case was one of all civil actions arising under the U. S. Constitution and laws. So the district court has the original jurisdiction over this case no matter whether Yu went to THRC/EEOC for administrative remedy or not. To this end, the defendant's allegation that Yu should be barred from filing the case with the Federal Court due to her failure to exhaust administrative remedy with THRC/EEOC within

180-300 days could not possibly be correct because it had conflict with the federal jurisdiction laws as well. The U. S. Jurisdiction law provides a plaintiff a statutory right to commence a civil action within two years (730 days). However, according to the defendants, Yu's statutory right was reduced to 180-300 days, and the District Court's original jurisdiction, pursuant to 28 U.S.C. §§1331, over this civil case became the secondary jurisdiction.

C. Administrative Remedy Was Not A Sufficient Issue to Dismiss the TxDOT Defendants from This Case

Unlike other employment discrimination cases, the real plaintiff in this case passed away. No matter how the EEOC/THRC remedied the case, they could not remedy Dr. Wu's pain and grievance nor bring him back to life. The exhaustion of administrative remedy became speculative for the TxDOT defendants to impede the service of justice in this case. Exhaustion of administrative remedies is not a prerequisite to a federal court's jurisdiction. See *Chailland v. Brown & Root, Inc.*, 45 F.3d 947, 950 n.6 (5th Cir. 1995); *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 441 (8th Cir. 1997), cert. denied, 118 S. Ct. 1516 (1998).

In particular, it was the THRC who refused to take a case for a deceased, which was not Yu's fault. It appeared ridiculous that the State of Texas denied the "Equal Protection" of laws to a deceased, but raised frivolity in Court for the State's failure to comply with law. Even assuming that the "Enforcement Provision" indeed manifested such prerequisite, Yu's previous filing of a discrimination case with the state court should be deemed as Yu's effort to exhaust administrative remedy. As a matter of the original law, such alleged prerequisite does not even exist. In any event, the administrative remedy was not a sufficient issue to dismiss TxDOT defendants from this case. The misinterpretation of the original law corrupts Equal Justice under Law.

3. THE DISTRICT COURT FAILED TO UPHOLD EQUAL JUSTICE UNDER LAW.

A. The District Court Failed to Enter Default Judgment Based on Summons and Federal Rules.

The Court-issued Summons and Federal Rule 12(a)(1)(A) require the defendants serve Yu an answer within 20 days after being served with the summons and complaint. The service to a party is effective when the U. S. Post Officer delivers the mail to the party's mailing address or the U. S. Marshall hands over the document to the party or the party's agent. A certified mail with return receipt is an acceptable approach for the service of process according to Fed. R. Civ. P. 4(e)(2). To this extent, if the service is carried out by mail, the 20 days time frame should be counted from the time a postman delivered the complaint and summons to the defendants' mailing address to the time another postman delivered the answer to Yu's mailing address. In this case, the defendants filed the motion/answer with Court on the 20th day but served Yu after 20 days. As the Summons and Federal Rule 12(a)(1)(A) do not require the defendants file the answer with Court within 20 days, their failure to comply with the Summons and Rules rendered the entrance of default judgment. But the district court failed to comply with Fed. R. Civ. P. 55 to enter default judgment.

B. The District Court Failed to Comply with Appellate Rules and to Construe Jurisdiction in a Fair Manner.

In terms of jurisdiction, the district court failed to uphold equal justice under law on the following two episodes. First, when the district court had full jurisdiction over this civil case pursuant to Title 28 U.S.C. §§1331, it alleged that it did not have such. So it dismissed the TxDOT defendants, contradictorily remaining the individual defendants in their individual capacity in this case. Second, when the district court indeed lost the jurisdiction during the pendency of appeal, the district court borrowed, grabbed or stole the jurisdiction, challenging the Federal appellate rules.

When this case was in the first appeal process, the district court automatically lost its jurisdiction in order to avoid conflict with upper courts. See *Henry v. Independent Am. Sav. Ass'n*, 857 F2d 995, 997 (5th Cir. 1988). If the judgement from the upper courts vacated or reversed the lower court's judgment, the district court should execute the higher court's judgment without delay. An appeallable final decision, according to *Cohen* doctrine extended from 28 U.S.C. §1291, is not necessary to be the decision to end the entire case. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To this end, the dismissal of the TxDOT defendants on January 7, 2002 was a conclusive final decision, meeting three conditions of *Cohen* doctrine, thus appeallable. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). As further evidence of this final decision, the district court quickly dismissed the remaining causes of this case without jury trial at all. Whether or not the higher courts accepted the appeal and how they construed the *Cohen* doctrine in this case were completely upon the upper courts. The district court did not have privilege to determine such. In particular, this case could not be discovered due to the dismissal of the TxDOT defendants, and parties agreed to postpone the trial due to the pendency of appeal. The district court had no legitimate reason to intervene into something that was not in dispute. Challenging the federal appellate rules, the district court deprived Yu of her equal rights to appeal and proceed the case. Along this abusive discretion, whether the district court has jurisdiction is not a matter of law but a game to play whenever it is pleases.

C. The District Court Violated Seventh Amendment for Jury Trial of This Case.

The Seventh Constitutional Amendment authorizes a party for jury trial should the controversy exceeds $20.00. A district judge's function is to administer justice and to ensure the due process of law rather than to dismiss a case because of the Seventh amendment. The right of trial by jury based

on the Seventh amendment is preponderant over a judge's discretion. Therefore, when the district court dismissed this jury trial case, it actually placed itself above the U. S. Constitution. This case was preserved for jury trial. The district court should not dismiss any claims or any defendants from this suit before the jury reaches the court. If one of the counts of a complaint is sufficient, a motion to dismiss should be denied in its entirety. *Eye Encounter, Inc. V. Contour Art, Ltd.,* D.C.N.Y.1979, 81 F.R.D. 683. However, the district court, disregarding the reminder of losing jurisdiction, still dismissed the entire case without jury trial.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that this Court grant a writ of *certiorari*, set the appeal for briefing and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully Submitted,

Li Yu

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APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

April 18, 2003
("FILED" Seal)

No. 02-50957
Summary Calendar

LI YU, Administrator of Estate of Wei Y. Wu,
Plaintiff – Appellant,

versus

STATE OF TEXAS DEPARTMENT OF TRANSPORTATION; CAROLINE A. HERRERA, In her Individual Capacity and her Official Capacity, Materials and Test Section, Construction Division, Texas Department of Transportation; KATHERINE L. HOLTZ, In her Individual Capacity and her Official Capacity, Materials and Test Section, Construction Division, Texas Department of Transportation

Defendants – Appellees.

Appeal from the United States District Court
for the Western District of Texas
(A-01-CV-741-SS)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Li Yu appeals, *pro se*, the dismissal of her action under the Americans With Disabilities Act, Title VII of the 1964

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Civil Rights Act, 42 U.S.C. §1983, 42 U.S.C. §1985 and Texas tort law. We affirm for essentially the reasons stated by the district court in its 7 January and 2 August 2002 orders.

Li Yu asserts, for the first time on appeal, default judgment should been entered against Defendants because they failed to timely answer her complaint. No authority need be cited for the proposition that our court will not consider contentions made for the first time on appeal. In any event, the Texas Department of Transportation (TxDOT) timely filed 12(b)(1) and (b)(6) motions and Herrera and Holtz timely filed answers in response to the complaint.

The district court properly held it lacked subject matter jurisdiction because TxDOT and Herrera and Holtz, in their official capacities, were immune from suit under the Eleventh Amendment. E.g., ***Board of Trustees of the University of Alabama v. Garrett***, 531 U.S. 356 (2001). While there may be subject matter jurisdiction for the Title VII claim, the district court properly dismissed that claim for failure to exhaust administrative remedies. ***Griffin V. City of Dallas***, 26 F.3d 610, 612-13 (5th Cir. 1994).

Finally, the district court did not abuse its discretion in dismissing, for failure to prosecute, the claims against Herrera and Holtz, in their individual capacities. ***Salinas v. Sun Oil Co.***, 819 F.2d 105, 106 (5th Cir. 1987).

AFFIRMED

Supreme Court, U.S.
FILED

03 333 JUL 14 2003

No.

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LI YU,
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Petitioner,

v.

STATE OF TEXAS DEPARTMENT OF TRANSPORTATION;
CAROLINE A. HERRERA,
In Her Individual and Official Capacity;
KATHERINE HOLTZ,
In Her Individual and Official Capacity.

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

SUPPLEMENTARY APPENDICES

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

LI YU, ADMINISTRATOR OF THE ESTATE OF WEI Y. WU,
Plaintiff

"FILED"
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JAN 07 2002

V.

No. A-01-CA-741 SS

TEXAS DEPARTMENT OF TRANSPORTATION, CAROLINE HERRERA, KATHERINE HOLTZ,
Defendants

ORDER

BE IT REMEMBERED that on the 7th day of January 2002, the Court reviewed the file in the above-styled cause, specifically Defendants Motion to Dismiss [#3], Plaintiff's Response [#5], and Defendants' Reply [#6]. Having considered the motion and responses, the case file as a whole and the applicable law, the Court enters the following opinion and order.

The Plaintiff, Li Yu, sues on behalf of the estate of Wei Y. Wu under the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §1983, 42 U.S.C. §1985, and state tort law. Yu seeks a declaratory judgment, injunctive relief, monetary damages for lost income, pain and suffering, funeral costs and administrative expenses, punitive damages, and attorney's fees. In this motion, the Texas Department of Transportation ("TXDOT") and Caroline A. Herrera and Katherine L. Holtz, in their official capacities,[1] request dismissal of Yu's claims against them based on failure of jurisdiction and failure to state a claim upon which relief can be granted.

[1] This order does not apply to Yu's suit against Herrera and Holtz in their individual capacities. They have filed an answer to the complaint in their individual capacities.

Background

At the time of his death, Wei Yi Wu was employed as an engineer supervisor by TXDOT in the Materials and Testing Section, Construction Division, in Austin, Texas. *See* Complaint, ¶9. Defendants Herrera and Holtz were also TXDOT employees and Wu's supervisors. *See id.*, at ¶11-12. Yu was appointed administrator of Wu's estate by Probate Court of Travis County and sues on behalf of Wu's estate for events that took place between April 1999 and November 20, 1999. *See id.*, at ¶8. In her complaint, Yu alleged Herrera and Holtz discriminated against and harassed Wu because of his Chinese descent and his accent when speaking English. *See id.*, at ¶16-23. When Wu began suffering headaches and other symptoms from a cancerous brain tumor in August 1999, Herrera refused to accommodate his illness and harassed him further. *See id.*, at ¶24-28. Wu was diagnosed as having a brain tumor on November 3, 1999, and underwent surgery to remove the tumor on November 9. *See id.*, at ¶29-30. On November 18, he returned to work, and TXDOT Human Resources officials requested he continue taking sick leave. *See id.*, at ¶36-39. On November 19, Wu again returned to work, but Herrera and Holtz again escorted him home. *See id.*, at ¶40-43. Later that day, TXDOT employees allegedly escorted Wu to an appointment with his doctor about which he had no prior knowledge, and at that appointment obtained confidential medical information about Wu's condition from his doctor. *See id.*, at ¶44-46. On November 20, 1999, Wu committed suicide. *See id.*, at ¶47.

Analysis

I. Standard for Motion to Dismiss

TXDOT, Herrera and Holtz ("Defendants") move to dismiss Yu's complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.[2] In

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[2] Defendants also move to dismiss on behalf of the State of Texas. However, the State of Texas was not named as a defendant in Yu's complaint, despite Defendants' interpretation the style of the case, which reads "State of Texas-Department of Transportation." In the description of the parties in the complaint, Yu clearly names only TXDOT, Herrera, and Holtz. *See* Complaint, ¶ 10. This issues is, of course, immaterial as a lawsuit against TXDOT is in effect one against the State of Texas.

deciding whether to dismiss for failure to state a claim, "the district court must take the factual allegations of the complaint as true and resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). The Court should dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 78 S. Ct. 99, 102 (1957). The same standard is used to analyze a motion to dismiss for lack of subject matter jurisdiction. *See Benton v. U. S.*, 960 F.2d 19, 21 (5th Cir. 1992).

II. **ADA and Title VII Claims**

Yu sues Defendants on behalf of Wu's estate for disability and national origin discrimination under Title VII and the ADA. Under both statutes, a plaintiff must first exhaust her administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or the Texas Commission on Human Rights ("TCHR") before filing a lawsuit in federal court. *See* 42 U.S.C. §2000e-5; 42 U.S.C. §12117(a); *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996); *Cruce v. Brazosport Independent Sch. Dist.*, 703 F.2d 862, 863 (5th Cir. 1996). It is undisputed that neither Yu nor Wu filed a charge with the EEOC or TCHR. Yu contends a TCHR employee informed her it would not take a case for a deceased plaintiff. See Plaintiff's Response [#5], at 4. This limited inquiry does not qualify as exhaustion of administrative remedies.

The Fifth Circuit has held that failure to file a charge with the EEOC strips this Court of subject matter jurisdiction over a plaintiff's discrimination claim. See *Tolbert v. U.S.*, 916 F.2d 245, 247-48 (5th Cir. 1990). Because Yu did not exhaust her administrative remedies, this Court must dismiss her ADA and Title VII claims under Rule 12(b)(1) for failure of subject matter jurisdiction.[3]

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[3] Even if Yu had exhausted her administrative remedies under the ADA, Defendants are immune from suit under the Eleventh Amendment. The Supreme Court recently held suits by state employees against a state in federal court to recover money damages for the state's failure to comply with the ADA are barred by the Eleventh Amendment. *See Board of Trustees of the University of Alabama v. Garrett*, 531 U. S. 356 (2001).

III. Section 1983 Claims

Yu claims Defendants violated Wu's constitutional rights, including his Fourteenth Amendment rights to liberty and due process and his right to privacy. Although Yu does not specify that she brings these constitutional claims under 42 U.S.C. §1983, that statute is the proper enforcement mechanism for constitutional claims against state officials acting under color of state law. Section 1983 does not create substantive rights; it merely provides a remedy for substantive rights protected under the Constitution and laws. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

Defendants claim they are immune from suit under the Eleventh Amendment. The Eleventh Amendment divests federal courts of jurisdiction over suits against states and state agencies acting as an arm of the state. To determine if TXDOT is an arm of the state, the Court "must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself." *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 874 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 193 (1991). Other district courts in the Fifth Circuit have held TXDOT to be an arm of the state and, thus, immune from suit, and this Court agrees. *See Coburn v. Texas Dep't of Transp.*, 1997 WL 328009 (N.D. Tex. 1997); *Williams v. Texas Dep't of Transp.*, 1997 WL 53142 (N.D. Tex. 1997).

Because TXDOT is immune from suit, Herrera and Holtz are also immune from suit for actions taken in their official capacities. A suit against state officials acting in their official capacities is equivalent to a suit against the sovereign itself. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984). A plaintiff may only sue a state official in her official capacity for prospective injunctive relief. *See Ex Parte Young*, 209 U.S. 123 (1908). In her complaint, Yu requests "a preliminary and permanent injunction enjoining the TxDOT from discrimination and retaliation against the protected groups of people on any basis forbidden by the American ADA law and Title VII." Complaint, at ¶ 103(2). Defendants allege this request for injunctive relief does not qualify for the *Ex Parte Young* exception to Eleventh Amendment immunity because Yu does not allege

Wu suffers an ongoing violation of the law, since Wu died on November 20, 1999. *See e.g., Honig v. Doe*, 484 U.S. 305, 318-21 (1988); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996) ("Jurisdiction over a plaintiff's claim for future relief is appropriate only if a reasonable likelihood exists that the *plaintiff* will again be subjected to the allegedly unconstitutional actions."). Because Wu is deceased and the case names no other plaintiff, the Court finds the request for injunctive relief is not sufficient to bypass Defendants' Eleventh Amendment immunity under the *Ex Parte Young* exception.

IV. Section 1985 Claims

Yu also claims Herrera and Holtz conspired to violate Wu's constitutional rights in violation of 42 U.S.C. §1985(1). Section 1985(1) provides an action for damages against persons who "conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States" or "induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed." 42 U.S.C. §1985(1). Because Wu was a state employee, not an officer of the United States, this Court has no subject matter jurisdiction under section 1985(1).

To the extent Yu intends to bring a conspiracy claim under 42 U.S.C. §1985(3), Defendants are immune from suit. Section 1985(3) prevents people from conspiring to deprive any person or class of persons of equal protection of the laws or privileges and immunities of the laws. See 42 U.S.C. §1985(3). As the Court found Defendants are immune from suit under section 1983, it likewise finds they are immune

from suit under section 1985[4]. *See, e.g., Southward v. Texas Bd. of Crim. Justice,* 114 F.3d 539, 554-55 (5th Cir. 1997).

V. State Tort Claims

Yu also alleges Defendants committed various intentional torts, including intentional infliction of emotional distress, invasion of privacy, and defamation. Defendants claim they are immune to suit under state common law under the Eleventh Amendment. The Court's finding of immunity extends to state tort claims brought in federal court as well as claims under federal law. One exception to the doctrine of sovereign immunity arises when a state consents to suit. *See Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 304-05 (1990). The state of Texas consented to certain tort lawsuits in the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §100.001 et seq. Under the Tort Claims Act, a government entity protected by sovereign immunity waives its immunity in the limited instances enumerated in the Act. *See Poncar v. City of Mission*, 797 S.W.2d 236, 239 (Tex.App.-Corpus Christi 1990, no writ). However, in the Tort Claims Act, states only consented to suits brought in state court, not federal court. *See Sherwinski v. Peterson*, 98 F.3d 849, 851-52 (5th Cir. 1996)("[W]e find that the [Texas Tort Claims Act] waives sovereign immunity in state court only. This is the only reasonable construction of the statute. The Act clearly does not waive Eleventh Amendment immunity to suit in federal courts."). Additionally, the Act

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[4] Even if Defendants were not immune from suit, Yu has not stated a claim upon which relief can be granted under 42 U.S.C. § 1985(3). To state a claim under section 1985(3), Yu must allege (1) a racial or class-based animus motivated the conspiracy and (2) the conspiracy aimed to violate rights protected against private infringement. See Horaist v. Doctors' Hosp. of Opelousas, 255 F.3d 261, 270 (5th Cir. 2001); Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 345 (5th Cir. 1981). While Yu has arguably claimed Defendants discriminated against Wu on the basis of his national origin, she has not alleged Defendants discriminate against Chinese employees as a class.

does not waive immunity for claims arising out of intentional torts. See Tex. Civ. Prac. & Rem. Code Ann. 101.057. Thus, the state has not waived its immunity from intentional tort claims brought in federal court, and this Court has no jurisdiction over Yu's tort claims against TXDOT and Herrera and Holtz, acting in their official capacities.

In accordance with the foregoing:

IT IS HEREBY ORDERED that Defendants' Motion to dismiss [#3] is GRANTED;

IT IS FURTHER ORDERED that Yu's claims against Herrera and Holtz in their official capacities and all of Yu's claims against the Texas Department of Transportation are DISMISSED for failure of subject matter jurisdiction.

SIGNED this the 7th day of January 2002.

Signature
SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LI YU, ADMINISTRATOR OF
ESTATE OF WEI Y. WU,

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vs.

No. A-01-CA-741 SS

TEXAS DEPARTMENT OF
TRANSPORTATION, CAROLINE
HERRERA, KATHERINE HOLTZ

ORDER OF DISMISSAL

BE IT REMEMBERED on the 2nd day of August 2002 the Court called the above-styled cause for docket call, and Defendants Herrera and Holtz appeared through counsel of record. The Plaintiff, Li Yu, failed to appear, despite this Court's order of january 14, 2002, July 18, 2002, and July 29, 2002 notifying the partied of the date, time and location of docket call and setting the jury trial to begin August 5, 2002. The Plaintiff did not provide the Court or opposing counsel any reason for her failure to appear. The Clerk of the Court attempted to call Plaintiff on the telephone at the number Plaintiff provided in her pleadings, but no one answered the phone.[1] Upon Plaintiff's failure to appear, the Defendants moved to dismiss the complaint. Finding the Plaintiff received notice of docket call and failed to appear without good cause, the Court dismisses this case for want of prosecution

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[1] In fact, the Court and Court Clerk's attempts to contact Plaintiff by telephone and through the mail in the months since she filed this lawsuit have proven futile.

pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Accordingly, the Court enters the following order:

IT IS ORDERED that Plaintiff Li Yu's claims against Defendants Caroline Herrera and Katherine Holtz, in their individual capacities, are DISMISSED WITH PREJUDICE pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Each party shall bear its own costs.

SIGNED this the 2nd day of August 2002.

Signature
SAM SPARKS
UNITED STATES DISTRICT JUDGE